88-1417

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

SOMCHAI JARUSIRINUKUL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT III

DENNIS M. SULLIVAN
Counsel of Record
SULLIVAN & STEVENSON
Suite 220, 611 N. Broadway
Milwaukee, Wisconsin 53202
(414) 271-5272

Attorneys for Petitioner

March, 1989

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

WHETHER AN ALIEN ACCUSED OF A SERIOUS CRIME IS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE UNITED STATES CONSTITUTION WHEN HE, IN DIRECT RELIANCE ON THE INCOMPETENT AND MISLEADING ADVICE OF HIS DEFENSE ATTORNEY IN RESPONSE TO HIS SPECIFIC QUESTIONS CONCERNING THE DEPORTATION CONSEQUENCES OF A CRIMINAL CONVICTION, ENTERS A NO CONTEST PLEA AND IS SUBSEQUENTLY CONVICTED, SENTENCED, AND ORDERED DEPORTED.

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No. _____

In The

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October Term, 1988

SOMCHAI JARUSIRINUKUL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT III

The Petitioner respectfully requests that a writ of certiorari issue to review the per curiam opinion and judgment of the Third District Court of Appeals for Wisconsin entered on November 22, 1988.

OPINIONS BELOW

The unpublished order and decision of the Circuit Court of Brown County, Wisconsin, denying post-conviction relief, was entered on May 23, 1988, and is

reprinted at App. 8 to App. 14 of the Appendix to this petition.

The unpublished per curiam opinion of the Third District Court of Appeals of Wisconsin was filed on November 22, 1988, and is reprinted at App. 1 to App. 4 of the Appendix to this Petition.

The unpublished order of the Wisconsin Supreme Court, denying review, was filed on January 17, 1989, and is reprinted at App. 5 of the Appendix to this Petition.

JURISDICTION

The order and judgment of the Third District Court of Appeals for Wisconsin was entered on November 22, 1988. A timely petition for review was filed and on January 17, 1989, the Wisconsin Supreme Court entered an order denying review. This petition for a writ of certiorari was filed within sixty (60) days of the Wisconsin Supreme Court's order denying review.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the application of the following provisions of the United States Constitution:

U.S. Const. Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.

U.S. Const. Amend. XIV, § 1:

No State . . . shall . . . deprive any person of life, liberty or property, without due process of law; . . . .

STATEMENT OF THE CASE

Petitioner Somchai Jarusirinukul was born in Bangkok, Thailand on October 1, 1964. Mr. Jarusirinukul entered the United States, to join other members of his family, as a lawful permanent resident in August of 1981 when he was seventeen years of age. When he first entered the United States, Somchai could not speak, read or write the English language. The only language he knew was Thai. (R. 44:3-5).

In early 1985, Somchai Jarusirinukul obtained a G.E.D. which is the certified equivalent of a high school education. In order to obtain the G.E.D., Mr. Jarusirinukul was required to pass four courses, including math, social studies, science and English. He barely passed these courses and found the most difficult subject matter to be English. (R. 44:5-6).

In November of 1985, a criminal complaint was issued against Mr. Jarusirinukul charging him with possession of marijuana and possession of heroin with the intent to deliver. Given Somchai's indigence, a staff attorney for the Wisconsin State Public Defender was appointed to represent him in connection with the criminal

charges. (R. 6:1). This staff attorney represented Somchai from November of 1985 through the entry of a judgment of conviction and sentence in this case in March of 1986. Throughout the trial court proceedings, defense counsel knew that Mr. Jarusirinukul was not a United States citizen. (R. 44:7-8).

During the five-month period of representation, Somchai met with his attorney on approximately five occasions. On each of these occasions, Somchai Jarusirinukul was able to spend about 20 or 30 minutes with his attorney. On at least two of these occasions, Somchai told his defense attorney that he was concerned about the possibility of deportation from the United States as a consequence of the criminal proceedings. Mr. Jarusirinukul wanted to know what would happen to his immigration status if he were to be convicted of the criminal charges. In response to Mr. Jarusirinukul's specific questions, defense counsel assured his client "not to worry." (R. 44:8-9). Upon receiving this advice from his attorney, Somchai Jarusirinukul no longer worried about the possibility of deportation. (R. 44:22). In fact, Mr. Jarusirinukul believed that the deportation matter would be resolved as part of the plea bargain process in the trial court. (R. 44:19).

Mr. Jarusirinukul's step-father, Thomas Kurek, also met with Somchai's defense attorney in November of 1985. Mr. Kurek was also concerned about the possibility that the Immigration & Naturalization Service would initiate deportation proceedings in connection with the criminal charges. In raising this specific concern with Somchai's defense attorney, Mr. Kurek was told by counsel that his concerns "were a bit premature." (R. 44:25-26).

Somchai Jarusirinukul subsequently entered pleas of no contest to both of the charges set forth in the criminal complaint. On March 27, 1986, a judgment of conviction and sentence was entered against Mr. Jarusirinukul by which he was ordered to serve an indeterminate term of incarceration not to exceed three years. (R. 26:1). After entering the Wisconsin State Prison system, Somchai Jarusirinukul learned for the first time, from a state social worker, that he could be deported for his criminal conviction. (R. 44:10).

Within less than one month of Mr. Jarusirinukul's sentencing hearing, the Wisconsin legislature formally amended state statutes governing guilty and no contest plea procedures. Under the amendments, trial courts are now required to advise all criminal defendants of the possibility of deportation for a criminal conviction prior to the taking of a no contest or guilty plea.

Somchai Jarusirinukul subsequently filed a post-conviction motion in the Wisconsin trial court seeking to set aside his judgment of conviction and requesting leave to withdraw his no contest pleas on the basis that his attorney's misleading and inadequate advice concerning the immigration consequences of the pleas deprived him of his right to effective assistance of counsel under the United States and Wisconsin Constitutions. (R. 30:1-19).

During an evidentiary hearing upon the motion, defense counsel conceded that he did not spend more time with Somchai than he would have with a client who had a better command of the English language. (R. 44:32). Counsel acknowledged that Somchai had difficulty with

speaking and reading English and had difficulty in comprehending certain legal concepts. (R. 44:31-32). While defense counsel stated that he would have referred Somchai to another attorney if the deportation matter had arisen, counsel admitted that he told Mr. Jarusirinukul not to worry about being deported. (R. 44:30-31). Defense counsel finally testified that he never researched immigration law and took none of the steps which are now statutorily required of Wisconsin trial courts by which criminal defendants receive warnings concerning the immigration consequences of no contest and guilty pleas. (R. 44:29-30).

Following the hearing, the trial court denied Somchai Jarusirinukul's requested relief on the grounds that "there was no statutory or case law that required . . . defense counsel to advise the defendant of possible deportation in the event he entered a plea of no contest." (App. 12).

Following the denial of his post-conviction motion, Somchai Jarusirinukul appealed the ineffective assistance of counsel issue to the Third District Court of Appeals in Wisconsin. On November 22, 1988, the Wisconsin Court of Appeals affirmed the judgment and order of the trial court by holding that an attorney has no duty to inform his client of the possible immigration consequences of a no contest plea. (App. 2). With regard to the issue that counsel's advice had been inadequate and misleading, the Wisconsin Court of Appeals held that "[b]ecause the attorney had no duty to inform [Mr. Jarusirinukul] of the possible immigration consequences of his no contest pleas, it cannot be said that the attorney gave inappropriate advice." (App. 2-3).

Mr. Jarusirinukul subsequently filed a petition in the Wisconsin Supreme Court to review the issue of whether he had been deprived of effective assistance of counsel under the United States and Wisconsin Constitutions. On January 17, 1989, the Wisconsin Supreme Court entered an order denying review. (App. 5). This petition for a writ of certiorari followed.

While this case was pending in the Wisconsin state courts, Somchai Jarusirinukul was ordered deported from the United States. (App. 15). The order of deportation is being appealed to the Board of Immigration Appeals. (App. 17).

REASONS FOR GRANTING THE WRIT

I. THE WISCONSIN COURT OF APPEALS' DECISION IN THIS CASE CONFLICTS WITH THE DECISIONS OF OTHER STATE AND FEDERAL COURTS ON THE ISSUE OF WHETHER AN ALIEN-DEFENDANT HAS A SIXTH AMENDMENT RIGHT TO RECEIVE PROPER ADVICE FROM DEFENSE COUNSEL CONCERNING THE IMMIGRATION CONSEQUENCES OF A GUILTY OR NO CONTEST PLEA.

The Wisconsin Court of Appeals' decision in this case directly conflicts with the decisions of other state courts in Colorado, Illinois, California, Oregon, Pennsylvania and Michigan which have held that an alien-defendant may be deprived of his constitutional right to effective assistance of counsel when his defense attorney fails to provide proper advice concerning the immigration consequences of a guilty or no contest plea. *See People v. Pozo*, 746 P.2d 523 (Colo. 1987); *People v. Padilla*, 151 Ill. App. 3d

297, 502 N.E.2d 1182 (1986), *appeal denied*, 114 Ill. 2d 554, 508 N.E.2d 734 (1987); *People v. Soriano*, 194 Cal. App. 3d 1470, 240 Cal. Rptr. 328 (1987); *Lyons v. Pearce*, 298 Or. 554, 694 P.2d 969 (1985); *Commonwealth v. Wellington*, 305 Pa. Super. 24, 451 A.2d 223 (1982); *People v. Kadadu*, 169 Mich. App. 278, 425 N.W.2d 784 (1988).

The decision in this case also conflicts with the decisions of courts in Minnesota, Maryland, New Jersey and Ohio which have implicitly recognized that defense counsel's failure to render proper advice concerning the immigration consequences of a criminal conviction may result in ineffective assistance of counsel and may entitle the alien-defendant to withdraw his plea. *See State v. Lopez*, 379 N.W.2d 633 (Minn. App. 1986); *Daley v. State*, 61 Md. App. 486, 487 A.2d 320 (1985); *State v. Chung*, 210 N.J. Super. 427, 510 A.2d 72 (N.J. Super. A.D. 1986); *State v. Arvanitis*, 36 Ohio App. 3d 213, 522 N.E.2d 1089 (1986).

In contrast, the Wisconsin Court of Appeals' decision in this case is consistent with state court decisions in Florida, Alaska and Arizona which have held as a matter of law, that an alien-defendant has no fundamental right to receive proper advice from his attorney concerning the immigration consequences of a plea. *State v. Ginebra*, 511 So. 2d 960 (Fla. 1987); *Tafoya v. State*, 500 P.2d 247 (Alaska 1972), *cert. denied*, 410 U.S. 945 (1973); *State v. Rodriguez*, 17 Ariz. App. 553, 499 P.2d 167 (1972).

Unlike the Wisconsin Court of Appeals, other state and federal courts have drawn a distinction between a case in which counsel affirmatively misleads his client and a case in which counsel simply fails to investigate and warn his client of the deportation consequences of a

criminal conviction. *Mott v. State*, 407 N.W.2d 581, 583 (Iowa 1987); *People v. Correa*, 108 Ill. 2d 541, 485 N.E.2d 307 (1985); *Downs-Morgan v. United States*, 765 F.2d 1534, 1541 (11th Cir. 1985); *United States v. Nagaro-Garbin*, 653 F.Supp. 586, 590-91 (E.D. Mich.), *aff'd*, 831 F.2d 296 (6th Cir. 1987); *United States v. Santelises*, 509 F.2d 703, 704 (2nd Cir. 1975).

II. THE WISCONSIN COURT OF APPEALS' DECISION IN THIS CASE PERPETUATES AN INTERNAL CONFLICT OF CONSTITUTIONAL AND STATUTORY DUTIES FOR WISCONSIN COURTS AND COUNSEL WITH REGARD TO THE ADVICE TO BE GIVEN ALIEN-DEFENDANTS UPON THE TAKING OF A PLEA.

Wisconsin is one of seven states which statutorily require trial courts to personally warn criminal defendants that a guilty or no contest plea may result in deportation under federal law. *See* Wis. Stat. § 971.08 (1985-86); Cal. Penal Code § 1016.5 (1985); Mass. Gen. Laws Ann. ch. 278 § 29D (1980); Or. Rev. Stat. § 135.385 (1981-82); Conn. Gen. Stat. ch. 959 § 54-1j (1987); Tex. Code Crim. Proc. Ann. art. 26.13(a)(4) (1986-87); Wash. Rev. Code Ann. § 10.40.200 (1988). The Wisconsin statute provides that before a trial court may accept a no contest or guilty plea, the court shall:

> Address the defendant personally and advise the defendant as follows: 'If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion

> from admission to this country or the denial of naturalization, under federal law.'

Wis. Stat. § 971.08(1)(c) (1985-86).

If a Wisconsin trial court fails to advise a defendant concerning the immigration consequences of a plea, the trial court is required to vacate any applicable judgment against the defendant upon a showing that the plea is likely to result in his deportation, exclusion from admission or denial of naturalization. Wis. Stat. § 971.08(2) (1985-86).[1]

The Wisconsin Court of Appeals in this decision and in the only precedent decision in Wisconsin on the issue has held that defense counsel has no duty to advise his alien-client of the immigration consequences of a no contest or guilty plea on the basis that deportation is a collateral consequence of a criminal conviction. (App. 2); *State v. Santos*, 136 Wis. 2d 528, 401 N.W.2d 856 (Wis. Ct. App.), *rev. denied*, 137 Wis. 2d 652, 411 N.W.2d 140 (1987). By virtue of these decisions, an anomaly exists in Wisconsin law. Whereas trial courts are statutorily required to advise all defendants of the immigration consequences of a guilty or no contest plea, defense attorneys are free to provide erroneous, inadequate, improper and conflicting advice to their clients concerning the same consequences of the plea.

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[1] Sections 971.08(1)(c) and (2) of the Wisconsin Statutes became effective on April 24, 1986. The judgment of conviction and sentence in this case was entered approximately one month earlier on March 27, 1986.

In states such as Oregon and California where trial courts are statutorily required to warn defendants of the possibility of deportation upon conviction, defense attorneys must also provide their alien-clients with the same proper advice. *See Lyons v. Pearce*, 298 Or. 554, 694 P.2d 969 (1985); *People v. Soriano*, 194 Cal. App. 3d 1470, 240 Cal. Rptr. 328 (1987). Unlike the Wisconsin Court of Appeals in this case, most courts recognize that the duties imposed upon defense counsel far exceed the duties imposed upon trial courts. *Michel v. United States*, 507 F.2d 461, 466 (2nd Cir. 1974); *People v. Pozo*, 746 P.2d 523, 526 (Colo. 1987).

III. THE WISCONSIN COURT OF APPEALS' DECISION IN THIS CASE FAILS TO ANALYZE THE SIXTH AMENDMENT ISSUE WITHIN THE FRAMEWORK ESTABLISHED BY THIS COURT.

This Court has held that the Sixth Amendment right to effective assistance of counsel applies to all critical stages of a criminal proceeding, including the entry of a guilty or no contest plea. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). In determining whether a defendant has been denied effective assistance of counsel in connection with the entry of a plea, a two-pronged analysis is to be applied. There must be a showing that defense counsel's performance was deficient and that such deficient performance prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, *reh'g denied*, 467 U.S. 1267 (1984). To establish the prejudice prong of this analysis, the defendant must show that "there is a reasonable probability that, but for counsel's errors, [the defendant] would not

have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

While this Court held in *Strickland* that a claim of ineffective assistance of counsel is to be analyzed on a case-by-case basis, the Wisconsin Court of Appeals has determined that no such individualized analysis is warranted in cases of this nature. *See Strickland* at 690. As a result, the Wisconsin Court of Appeals has foreclosed all alien-defendants in Wisconsin from seeking redress on this issue no matter how unprofessional or egregious counsel's conduct may be and regardless of whether counsel affirmatively misleads his client.

IV. AS A MATTER OF PUBLIC POLICY, THE ISSUE OF WHETHER AN ALIEN-DEFENDANT HAS A SIXTH AMENDMENT RIGHT TO RECEIVE PROPER ADVICE FROM COUNSEL CONCERNING THE IMMIGRATION CONSEQUENCES OF A PLEA SHOULD BE RESOLVED FOR ALL COURTS IN THE UNITED STATES.

Legal commentators overwhelmingly agree that defense attorneys should be aware of the immigration consequences of a criminal conviction and that alien-defendants have the right to be informed of such consequences prior to the entry of a no contest or guilty plea. Hall, *Paradise Lost or A Beginner's Guide to Representing Noncitizen Defendants*, 56 Wis. Bar. J. 17 (April 1983); Schey, *Deportation Consequences of Criminal Convictions*, 25 The Judges Journal 37, 51 (Spring 1986); McKinney, *The Right of the Alien to be Informed of Deportation Consequences Before Entering a Plea of Guilty or Nolo Contendere*, 21 San Diego L. Rev. 195, 223-24 (1983); Bastone, *What Every*

Attorney Who Defends A Criminal Case Should Know – And Usually Doesn't – About the Immigration and Nationality Act, 22 B.B.J. 3 (1978); Wexler and Neet, *The Alien Criminal Defendant: An Examination of Immigration Law Principles for Criminal Law Practice*, 10 Crim. L. Bul. 289, 317 (1974); Appleman, *The Recommendation Against Deportation*, 58 A.B.A. J. 1294 (1972).

The American Bar Association's standards for criminal justice similarly recognize an alien-defendant's basic right to know of the immigration consequences of a guilty or no contest plea regardless of whether such consequences are collateral or not by stating that:

> Many collateral consequences may follow conviction, such as . . . deportation or expatriation. Where from the nature of the case it is apparent that these consequences may follow . . . *or where the defendant raises a specific question concerning the collateral consequences (as where the defendant inquires about the possibility of deportation), counsel should fully advise the defendant of these consequences.*

A.B.A. Guilty Plea Standard, standard 14-3.2(b) (2nd ed. 1982)(emphasis supplied).

The view expressed by these authorities is consistent with the need to establish a uniform manner of analyzing an alien-defendant's rights to receive the competent advice of defense counsel under the Sixth Amendment to the United States Constitution. This need is particularly acute in cases such as this one where the advice rendered in response to the alien's questions is inadequate and misleading. Given the increasing number of aliens entering this country on an annual basis, the need to harmonize the law on this issue will only continue to grow.

CONCLUSION

For these reasons, the Petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Third District Court of Appeals in Wisconsin.

Respectfully submitted,

DENNIS M. SULLIVAN
Counsel of Record
SULLIVAN & STEVENSON
Suite 220, 611 N. Broadway
Milwaukee, Wisconsin 53202
(414) 271-5272

Attorneys for Petitioner

No. 88-1018-CR

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SOMCHAI JARUSIRINUKUL,

Defendant-Appellant.

(Filed Nov. 22, 1988)

APPEAL from a judgment and an order of the circuit court for Brown county: ALEXANDER R. GRANT, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Somchai Jarusirinukul appeals a judgment convicting him of possessing heroin with intent to deliver and possessing marijuana, and an order denying his motion to withdraw his no contest pleas. He argues that he was denied effective assistance of counsel, that recent amendments to Wisconsin law regarding notification of the effect of conviction on deportation should be applied retroactively, that he is entitled to withdraw his pleas as a matter of right because he did not understand his right to a unanimous jury, and that he is entitled to a new trial in the interest of justice. Because we find no merit to any of these arguments, we affirm the judgment and order.

In response to questions concerning immigration consequences of a criminal conviction, Jarusirinukul's

attorney told him not to worry and that any immigration problems would be dealt with as they arose. Relying on advice of counsel, Jarusirinukul entered pleas of no contest to both charges. He was found guilty and sentenced to three years imprisonment. As a result of the no contest pleas and conviction, he now faces deportation to Thailand.

In *State v. Santos,* 136 Wis.2d 528, 529, 401 N.W.2d 856, 857 (Ct. App. 1987), we held that a defendant was not denied effective assistance of counsel when his trial attorney failed to inform him of the possible immigration consequences of his guilty pleas. Jarusirinukul argues that because his attorney gave him inadequate advice in direct response to inquiries about the impact of a conviction on his immigration status, his case is distinguishable from *Santos.* In *Santos,* the defense attorney already knew that Santos was an alien and that conviction would likely result in serious immigration consequences. Because Santos' attorney was on notice that the immigration consequences of conviction were important to his client, the fact that Santos did not specifically inquire about those consequences does not legally distinguish that case from Jarusirinukul's.

Nor is Jarusirinukul's case distinguishable on the ground that his attorney rendered inappropriate advice. According to Jarusirinukul, the only thing his defense counsel said in response to inquiries about immigration consequences was not to worry, and that any problems would be dealt with in due course. The record shows that Jarusirinukul's attorney told him that he would be referred to other counsel if the issue of deportation arose. Because the attorney had no duty to inform him of the

possible immigration consequences of his no contest pleas, it cannot be said that the attorney gave inappropriate advice.

After Jarusirinukul's plea hearing, sec. 971.08(1)(c) and (2), Stats., was modified to require notification to a criminal defendant of the effect of his plea on his immigration status. There is no basis for retroactively applying those statutes. Statutes are generally construed to relate to future acts. *Gutter v. Seamandel*, 103 Wis.2d 1, 17, 308 N.W.2d 403, 411 (1981). The modifications to sec. 971.08 are not procedural or remedial in nature, and should not be given retroactive effect. *See, e.g., Boggs v. Morden*, 117 Wis.2d 773, 775, 345 N.W.2d 490, 491-92 (1984). Because the amendments to sec. 971.08 impose an obligation on the trial court at the plea hearing, they are substantive provisions under the definition given in *City of Madison v. Town of Madison*, 127 Wis.2d 96, 102, 377 N.W.2d 221, 224 (Ct. App. 1985), and ought not be applied retroactively.

Nor is Jarusirinukul entitled to withdraw his no contest pleas on the ground that he failed to comprehend his right to a unanimous jury. The record shows that the trial court explained to Jarusirinukul that all twelve jurors must agree in order for the court to accept a verdict of guilty. The trial court believed Jarusirinukul's statements at the plea hearing that he understood these rights, and disbelieved his subsequent statements that he did not understand them. In light of the court's explanation of the unanimous jury rule at the plea hearing, its finding that he understood his right to a unanimous jury is not clearly erroneous. *See* sec. 805.17(2), Stats.

We find no basis for reversal in the interest of justice. The alleged errors, taken together, establish no basis for believing that Jarusirinukul's trial was unfair or that he was not guilty of the offenses to which he pled no contest.

By the Court. – Judgment and order affirmed.

Publication in the official reports is not recommended.

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Hon. Alexander Grant
Circuit Court for Brown County
Brown County Courthouse
Green Bay, WI 54301

Madison, January 17, 1989

To
Marguerite M. Moeller
Asst. Attorney General
P. O. Box 7857
Madison, WI 53707-7857

Dennis M. Sullivan
Sullivan & Stevenson
611 N. Broadway, Suite 220
Milwaukee, WI 53202

John P. Zakowski
District Attorney
P. O. Box 1600
Green Bay, WI 54301

The Court today announced an order in your case as follows:

No. 88-1018-CR *State v. Jarusirinukul* (T.C. 85 CR 1295)

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of defendant-appellant-petitioner, Somchai Jarusirinukul, and considered by the court,

IT IS ORDERED that the petition is denied, without costs.

Bablitch, J., did not participate.

MARILYN L. GRAVES
Clerk of Supreme Court.

COURT OF APPEALS
OF WISCONSIN
P.O. BOX 1688
MADISON, WI 53701-1688

DISTRICT 3

REMITTITUR

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,
V.
SOMCHAI JARUSIRINUKUL,
DEFENDANT-APPELLANT.

APPEAL NO.
88-1018-CR

T.Ct. NO.
85 CR 1295

THIS CAUSE WAS AN APPEAL TO REVIEW THE JUDGMENT AND ORDER OF THE CIRCUIT COURT OF BROWN COUNTY. UPON CONSIDERATION, IT IS ORDERED AND ADJUDGED BY THIS COURT IN AN OPINION FILED ON NOVEMBER 22, 1988, THAT:

NUMBER OF PAGES = 005
Judgment and order affirmed.
PANEL: DLL G M T C
PANEL: HON. DANIEL L LAROCQUE
HON. THOMAS CANE
HON. GORDON MYSE

THE APPEAL RECORD IS HEREBY RETURNED TO THE CLERK OF CIRCUIT COURT FOR BROWN COUNTY.

I CERTIFY THAT THE ABOVE IS A CORRECT TRANSCRIPT OF THE ORIGINAL ORDER AND JUDGMENT OF THE COURT IN THE ABOVE-ENTITLED CAUSE.

DATED:
JANUARY 20, 1989.

/S/ MLG
MARILYN L. GRAVES
CLERK, COURT OF APPEALS

STATE OF WISCONSIN BROWN COUNTY
CIRCUIT COURT
Branch IV

STATE OF WISCONSIN, Plaintiff,

v.

SOMCHAI JARUSIRINUKUL, Defendant.

ORDER DENYING POST-CONVICTION MOTION

Case No. 85-CR-1295

(May 23, 1988)

The court having received a post-conviction motion and supporting brief in the above-captioned case on January 26, 1988 by the defendant, Somchai Jarusirinukul, which requested an order from the court to vacate the defendant's judgment of conviction, for leave to withdraw the pleas of no contest and for trial pursuant to the provisions of sections 974.06 of the Wisconsin Statutes; and

The court having held an evidentiary hearing in connection with the motion on March 16, 1988 in which the defendant appeared in person and by counsel, Attorney Dennis M. Sullivan, and the State of Wisconsin appeared by counsel, Assistant District Attorney Patrick Hitt of the Brown County District Attorney's Office; and

The court having heard the testimony of witnesses and the arguments of counsel, and having reviewed the defendant's motion and supporting brief;

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The post-conviction motion by defendant Somchai Jarusirinukul seeking an order from the court to vacate his judgment of conviction, for leave to withdraw his pleas of no contest and for trial is denied for the reasons set forth in the attached Decision of the court dated May 18, 1988; and

2. The clerk of the trial court shall immediately enter this order denying the defendant's post-conviction motion in accordance with section 807.11 (2) of the Wisconsin Statutes.

Dated this 23 day of May, 1988 at Green Bay, Wisconsin.

BY THE COURT:

/s/ Alexander R. Grant
Alexander R. Grant
Circuit Court Judge,
Presiding

STATE OF WISCONSIN BROWN COUNTY
CIRCUIT COURT
Branch IV

STATE OF WISCONSIN,
Plaintiff,

v.

SOMCHAI JARUSIRINUKUL,
Defendant.

DECISION

Case Number 85-CR-1295

On February 25, 1986, the defendant, Somchai Jarusirinukul, entered pleas of no contest to a two-count information, possession of heroin with intent to deliver and possession of marijuana. The defendant was then represented by State Public Defender Michael Hanna and is now represented by Attorney Dennis M. Sullivan, who has filed a motion under Section 974.06 of the Wisconsin Statutes. The State of Wisconsin is represented by Assistant District Attorney Patrick Hitt. Briefs have been submitted by defense, but none from the State.

At the time of the conviction, Defendant was not a citizen of the United States but was a lawful resident of the United States. The sentence imposed by the Court on March 27, 1986, was three years in the Wisconsin State Prison system. The defendant has now been released from prison and is on parole.

The defendant moves this Court to set aside the Judgment of Conviction, to withdraw his plea of no contest, and for the Court to set a new trial.

The Federal Immigration and Naturalization Service filed an Order to Show Cause on June 19, 1987, as to why the defendant herein should not be deported. The above motion under 974.06 was heard by this Court on March 16, 1988. This motion does not include a request for judicial recommendation not to be deported.

The first issue before the Court is, was the defendant denied his applicable Constitutional rights of effective assistance of counsel at the time of the plea because he was not advised a guilty or no-contest plea might result in his deportation?

The Court admits that at the time of the sentencing on March 27, 1986, that the Court did not advise the defendant of the possibility of deportation.

The Wisconsin Legislature enacted Act 252 with an effective date of April 24, 1986, which modified or added to Section 971.08 of the Wisconsin Statutes whereby the Court was to advise the defendant that a no-contest plea of a plea of guilty was likely to result in the defendant's deportation. Sec. 971.08 is set forth in the brief of the defendant.

At the time of the plea there was no mandate that he should be informed that his plea would likely result in deportation, either on the part of the Court or on the part of the defense attorney. The effective date of the Act was, as mentioned above, April 24, 1986.

At the time of the hearing on March 16, 1988, the Court denied the motion as it pertained to effective assistance of counsel, holding that Mr. Hanna effectively represented the defendant.

At the time of the plea there was no statutory or case law that required the Court or the defense counsel to advise the defendant of possible deportation in the event he entered a plea of no contest. *State vs. Santos*, 136 Wis.2d 528 at pp. 532 and 533, and Section 971.08 Stats., as of February 24, 1986. All other aspects of 971.08 were complied with at the plea hearing, as the record will reflect.

The next question is, is the defendant entitled to withdraw his plea of no contest as a matter of right because the pleas were not knowingly, intelligently, and voluntarily made?

The record reflects that the Court, at the time of the plea, was satisfied that the defendant understood his rights and made a finding that he understood his rights. The defendant answered the questions appropriately and indicated he understood his rights. The Court can do nothing more than to ask a question. The Court cannot look into the defendant's mind to ascertain whether he understood his rights; the Court can only take the answers given by the defendant to make the finding it did.

The Court denied that part of the defendant's motion and argument for the reasons given.

The third question is, is the defendant entitled to withdraw his pleas of no contest as a matter of right because the statute now provides that the Court must inform a defendant that if he is not a citizen, he may be deported upon a conviction?

Section 971.08(2) provides, "If a court fails to advise a defendant as required by sub. (1)(c) and a defendant later shows that the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization, the court on the defendant's motion shall vacate any applicable judgment against the defendant and permit the defendant to withdraw the plea and enter another plea. This subsection does not limit the ability to withdraw a plea of guilty or no contest on any other grounds."

Counsel for Defendant also quotes Section 971.06(3) to the effect that the Court cannot require the defendant to disclose his or her citizenship status.

The Court asked the question as to the citizenship of the defendant and was told he was not a citizen. Section 971.06(3) was effective the same date as 971.08(1)(c), April 24, 1986.

The real question involved in this matter is whether or not the Court may and should declare Sec. 971.08(1)(c) a procedural or remedial statute.

This Court is of the opinion that Section 971.08(1)(c) is procedural in nature. However, the Court declines to apply the statute retroactively for the following reasons:

1. The Legislature, in the passage of 971.08(1)(c), had an opportunity to make the statute retroactive.

2. The Court of Appeals had an opportunity to apply Section 971.08(1)(c) retroactively when it decided *State vs. Santos*, supra, on January 27, 1987. (See Note 3 on page 531.) Although retroactivity was not discussed, the

Santos court held deportation is a collateral consequence of a guilty plea.

3. The Wisconsin Supreme Court also had an opportunity, in reviewing *State vs. Santos,* to also apply retroactively Section 971.08(1). However, the court denied review of *State vs. Santos,* supra, in 1987.

This Court feels that coupled with the collateral issue, which does not reach Constitutional dimensions (*Santos* case), and the several opportunities in the *Santos* case to apply the Statute 971.08(1)(c) retroactively, that the motion should be denied. This is really a matter for the Court of Appeals and not the trial court.

THEREFORE, the entire motion is denied.

Dated at Green Bay, Wisconsin, this 18th day of May, 1988.

BY THE COURT:

/s/ Alexander R. Grant
Alexander R. Grant (Sks)
Circuit Judge

ARG/sks

cc: Assistant District Attorney Patrick Hitt
Attorney Dennis Sullivan

U.S. DEPARTMENT OF JUSTICE

Executive Office for Immigration Review
Office of the Immigration Judge

File: A 37 021 695) IN DEPORTATION PRO-
) CEEDINGS PURSUANT
In the Matter of:) TO 8 U.S.C. 1101 et. seq.
) (The Immigration &
/s/ Somchai Jarusirinukul) Nationality Act)
Respondent/Applicant

MEMORANDUM OF ORAL DECISION

This is a summary of the oral decision entered on 6-9-88 in Milwaukee

This memorandum is solely for the convenience of the parties. If the decision is appealed, or the proceedings should be reopened, the oral decision will be transcribed and will become the official decision in these proceedings.

X The Respondent was ordered deported to Thailand.
___ The Applicant has been ordered excluded and deported.
___ The Respondent was granted voluntary departure on or before _____ with an alternate order of deportation to _____.
___ The Respondent was granted/denied relief under Section _____.
___ The application for Suspension of deportation under Section 244(a) of the Act was granted/denied/withdrawn.
___ The application for adjustment of status under Section 245 of the Act was granted/denied/withdrawn. It was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.
___ The application for Asylum/withholding of Deportation under Section 208(a)/243(h) of the Act was granted/denied/withdrawn.
___ The proceedings were terminated.

___ The Applicant is admitted as a _____ nonimmigrant until _____.

___ On condition that a maintenance of status and departure bond in the amount of _____ be posted.

___ The Applicant's request for leave to withdraw the application for admission to the United States was granted.

___ The Applicant/Respondent was granted a waiver under Section _____ of the Act and the proceedings were terminated.

___ The Respondent's status was rescinded under Section 246 of the Act.

___ The hearing was held *in absentia.*

___ _____

_____

_____

_____

_____

_____

_____

X This decision is final unless an appeal is taken to the Board of Immigration Appeals by returning to this office on or before 6-20-88 three copies of Form I-290A, Notice of Appeal, properly executed, together with a fee of one hundred ten dollars ($110.00). The Respondent has/have/reserved appeal.

/s/ Anthony D. Petrone
IMMIGRATION JUDGE

_____

NOTICE OF APPEAL TO THE BOARD OF IMMIGRATION APPEALS

SUBMIT IN TRIPLICATE TO: **Fee Stamp**

IMMIGRATION AND NATURALIZATION SERVICE

219 South Dearborn Street, Room 486

Chicago, Illinois 60604

In the Matter of: **File No.** A27 021 695

JARUSIRINUKUL, Somchai

1. **I hereby appeal to the Board of Immigration Appeals from the decision, dated June 9, 1988, in the above entitled case.**

2. **Briefly, state reasons for his appeal.**

   1. The Immigration Judge abused his discretion by denying the respondent's Motion for Continuance in that the Wisconsin statute, through which the state conviction is being attacked, has been deemed procedural in nature by the Wisconsin trial court and whose remedy of vacation of the conviction falls within the province of the Court of Appeals.

      AND

   2. The Immigration Judge's perception of the alien's defense as merely a collateral attack resulted in an improvident order of deportation which compromised the alien's due process right to a full hearing and is contrapositive to the interest of justice.

3. I **do not** **desire oral argument before the Board of Immigration Appeals in Washington, D. C.**
   (do) *(do not)*

4. I **am** ***filing a separate written brief or statement.*** *Attorney requests a forty-five (45) day period in which to file a brief in
   (am) *(am not)*

support of this appeal *after* the hearing record has been transcribed and completed.*

/s/ M. Corbett Stevenson
Signature of Appellant (or attorney or representative)
M. Corbett Stevenson
(Print or type name)
Sullivan & Stevenson
611 N. Broadway, Suite 220
Address (Nuber, Street, City, State, Zip Code)
Milwaukee, Wisconsin 53202

June 16, 1988
Date

IMPORTANT: SEE INSTRUCTIONS ON REVERSE SIDE OF THIS NOTICE

Form I-290A
(Rev.10-31-79)N